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No. 73-760

In the Supreme Court of the United States

OCTOBER TERM, 1973

HENRY L. TOMOW, SR., ET AL.,

Petitioners,

vs.

MENOMINEE ENTERPRISES, INC., ET AL.,

Respondents,

and

N. E. ISAACSON & ASSOCIATES, INC.,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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In their responses to the petition for certiorari, the respondents have basically asserted that the petition fails to conform to Rule 23-1(f) of the Rules of this Court, and that this case does not raise federal issues conferring jurisdiction upon this Court.

A. THE PETITION FOR CERTIORARI MEETS THE REQUIREMENTS OF RULE 23-1(f).

The legal questions presented by the petition rest entirely upon the petitioners' specially claimed rights under

a federal treaty,[1] federal statutes,[2] a federal-Indian document, the Menominee Termination Plan,[3] and the equal protection and due process clauses of the 5th and 14th Amendments to the Federal Constitution. The "History of Litigation" portion of the Statement of the Case, at pages 8-10 of the petition, clearly satisfies the requirements of Rule 23-1(f) in that it sets forth the federal nature of petitioners' initial claims in the pleadings, the respondents' admissions that 25 U.S.C. §896 and the Menominee Termination Plan apply to the case; and the fact that the State Court rulings on which petitioners seek review were based upon interpretation of 25 U.S.C. §§893 and 896, the language of the Termination Plan, and the federal constitution.

The petition at page 9 states, with citations to the appropriate opinions, that the Trial Court noted petitioners claim that "Indian lands were wrongfully taken;" that it considered the case as one involving this special context; that in view of the language of the Termination Plan relating to land sales, a review of all the circumstances surrounding the adoption of the Plan was necessary in order "to find out what the true intent of the Menominees was with respect to the sale of land,"[4] and that the tribe's intent in approving the language of Article XII was to reserve to its members the right to approve sales of tribal lands to non-Menominees. In other words, the Trial Court

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[1] The 1854 Treaty of Wolf River, Record pp. 285-286.

[2] 25 U.S.C. §§893 and 896, Record pp. 1417-1419.

[3] Plan for the Future Control of Menominee Indian Tribal Property and Future Service Functions, 26 Fed. Register, pp. 3726-3755 (April 29, 1961), Record pp. 295-324.

[4] See Trial Courts opinion, Pet. App. p. 49.

recognized petitioners' claims that a review of the circumstances surrounding the adoption of the Termination Plan by the tribe was in order, and it accordingly applied the liberal rule of construction in its consideration of the land sales issue. The petition further notes at page 9 that "the Wisconsin Supreme Court rejected the broad standard of review which was adopted by the trial court in finding that 'the language of the voting trust agreement, which was a part of the Termination Plan' granted the voting trustees the power to approve sales of tribal lands to non-Menominees." Lastly, the petition states on pages 9 and 10, with citations to the opinions, that both the Trial Court and the Wisconsin Supreme Court found that the establishment of the voting trust did not violate the requirements of 25 U.S.C. §893, and that the Wisconsin Supreme Court also held that petitioners' 5th and 14th amendment rights to due process and equal protection of the laws were not violated. Hence petitioners assert that, although the complex nature of the case and the holdings of the two state courts are greatly abbreviated, the petition conforms to the requirements of Rule 23-1(f).

B. THIS CASE RAISES SUBSTANTIAL FEDERAL QUESTIONS WHICH WERE CLEARLY RAISED AND PASSED UPON BY THE STATE COURTS BELOW.

By attempting to characterize the instant case as an "internal dispute" among Indians whose legal issues have been resolved by the construction of "corporate documents" by recourse only to State law, respondents have callously and deliberately ignored several critical factors: (a) the factual setting which initially gave rise to petitioners' claims; (b) the method in which the case was tried; and (c) the fact that in deciding the instant case,

both the Trial Court and the Wisconsin Supreme Court necessarily and clearly interpreted federal law, a federal Indian document, the Menominee Termination plan,[5] and the due process and equal protection clauses of the 5th and 14th Amendments to the Federal constitution.

1. The Land Sales Issue.

In addition to petitioners' claims in their pleadings and briefs to the Trial Court, the federal nature of the case was succinctly presented to that Court by the individual respondents' attorney, Mr. Church, in his opening remarks:

> **This was not something the Menominees decided for themselves. It was something they had to do pursuant to *federal* law. It is not only a decision of the Menominees as we point out in our brief. It involves a *bilateral contract between the Menominee Tribe and the federal government.* This was an *extension of the 1854 Wolf River Treaty.* This also involves the *nature of a federal regulation.*[6] (emphasis supplied)**

Thus, at the outset of the case, it was clear to the parties and the Trial Court that the issues presented by the petitioners' claims required the interpretation of federal Indian laws and documents.

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[5] In 25 U.S.C. §896, Pet. App. p. 75-76, Congress mandated that the Menominee Tribe formulate a "Termination" Plan, and that the Secretary of the Interior approve the Plan if it met various criteria and conformed to state and federal law, and he was also to publish it in the Federal Register. The Termination Act did not become fully effective until the Secretary published the Termination Plan. See message of Secretary accompanying publication of Plan, 26 Fed. Reg. p. 3726 (April 29, 1961) and the Court of Claims and this Court's comments in Menominee Tribe of Indians, 179 Ct. Cl. 496, 509 (1967), Aff'd 391 U.S. 404, 411 (1968).

[6] See Trial Transcript, Record page 1455.

The petitioners argued before the Trial Court that in resolving the Article XII ambiguity problem posed by the pleadings, it was necessary to look to the circumstances surrounding the Tribe's approval of the Termination Plan. The Trial Court noted the unique context and nature of the petitioners' and respondents' claims,[7] as well as the language of the voting trust agreement and MEI Articles of Incorporation and concluded that:

> "this is not an ordinary trust agreement but one that requires a consideration of the background and an interpretation of the plan against the proper setting."[8]

Accordingly, the Trial Court attempted to "find out what the true intent of the Menominees was with respect to the sale of land,[9] and thus, applied the liberal rule of construction in interpreting the language of the Termination Plan.

On appeal, the Wisconsin Supreme Court adopted a narrow view of the petitioners' claims, despite the fact that the Trial Court had previously used the broad standard of review. The State Supreme Court virtually ignored the Article XII interpretation question, which was the issue below,[10] and restated the land sales issue as:

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[7] See petition at pp. 9, 14-16, and Trial Court opinion, Pet. App., pp. 49-50, and comments, supra.

[8] See petition at p. 15, and Trial Court opinion Pet. App., pp. 49-50.

[9] See Trial Court opinion, Pet. App., p. 49.

[10] That Court lamely stated as to Article XII:

> While it is true that the language contained in Art. XII *may* have no effect while the trust is still in existence and while the shares are being voted as a unit by the trustees, *it will have a clear and unambiguous meaning after* the trust no longer exists; an eventuality which was within the contemplation of all

(Footnote continued)

> "whether the *voting trust agreement* clearly grants authority to the trustees to sell land to non-Menominees."[11] (emphasis supplied)

In construing a few general provisions of the trust agreement in a vacuum, despite the fact that that agreement incorporates the rest of the Termination Plan numerous times by reference,[12] the Wisconsin Supreme Court's analysis led it to the illogical conclusion that the Menominee tribal members in approving Article XII agreed that the 7 voting trustees, 3 of whom were non-Menominee, would have the power to sell their tribal lands to non-Menominee for a period of 10-30 years. After the termination of the trust, the tribal members would be able to approve such sales; if there was anything left to sell, that is. This conclusion is so abhorrent to the Menominee, and indeed, all Indians view of the land, as to be patently ridiculous. The Menominee Tribe did not agree to this interpretation of Article XII, nor did the Secretary when he approved the

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of the parties at the time the plan was adopted. Decision, Pet. App. pp. 27-29. (emphasis supplied)

Contrary to the respondents' contentions, it is petitioners' position that this statement constitutes an admission that the critical language of Article XII is ambiguous rather than a holding that it is unambiguous. It should also be noted that the "inoperativeness" of Article XII while the voting trust is in existence, which is implied in the statement, is wholly unsupported by the remainder of the decision. This implied holding is clearly inadequate to constitute justification for the Wisconsin Supreme Court's refusal to consider the specific language of Article XII relating to land sales and the intent of the Tribe when it approved the Plan.

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[11] See Wis. Supreme Court decision, Pet. App. p. 25.

[12] See Termination Plan, 26 Fed. Reg. pp. 3726, 3735 (Ap. 29, 1961), Record p. 304.

Plan. The Congressional intent behind 25 U.S.C. §896 was that the Menominee were to decide this question. The language of *Winters* v. *U.S.*, concerning the manner in which ambiguities or double-meanings in federal Indian documents must be interpreted,[13] is more pertinent than ever to the issues raised in this case. Contrary to petitioners' assertions,[14] petitioners strongly object to the narrow manner in which the Wisconsin Supreme Court approached the land sales issue, with its reliance on general words to the exclusion of specific language relating to land sales, and assert that that Court's decision must be overturned in order that the Menominees and all Indians may safely rely on their treaty and statutory rights to their land.[15]

2. The Validity of the Voting Trust Issue.

Contrary to the respondents' contentions, the Trial Court held that petitioners' rights under 25 U.S.C. §893

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[13] See petition, p. 20 and individual respondents' brief, p. 5. Also see Brief of Association on American Indian Affairs, Inc. as Amicus Curiae in Support of the Petition, p. 8, wherein numerous citations to the record are listed which indicate that the members of the Menominee Tribe had little or no understanding of the meaning and effect of various aspects of the Termination Plan.

[14] See individual respondents' brief, p. 9.

[15] As for respondents' contention that the application of the liberal rule of construction, and, thus, a consideration of tribal intent, would result in affirmation of the Wisconsin Supreme Court's decision, petitioners assert that the Trial Court, which did consider tribal intent, decided that the persuasiveness of the defendants' evidence, which consisted primarily of post-tribal-approval writings and oral recollections by two of the individual defendants of events which had occurred 12 years previously, was "far less than the writing" relied upon by petitioners (Pet. App. p. 54).

had not been denied,[16] and it noted that petitioners had also argued that their due process rights under the 5th and 14th amendments to the federal constitution had been denied by the method in which their beneficial interests which constituted personal property by virtue of §896, 25 U.S.C., had been alienated to the voting trust without individual tribal member approval.[17]

The Wisconsin Supreme Court stated the voting trust issue as whether the trial court had erred in holding that the "voting trust was not invalid because it was contrary to controlling federal and state law and the United States Constitution."[18] That Court discussed at length[19] the petitioners' procedural and constitutional arguments based on §893, including the fact that the Secretary had approved the Termination Plan. It, then, clearly held that the procedural requirements of §893 had been met, and that petitioners' 5th and 14th amendment constitutional rights based on the provisions of §893 had not been denied.[20]

As this Court stated in *Raley* v. *Ohio*, 360 U.S. 423, 436-7 (1959):

> There can be no question as to the proper presentation of a federal claim when the highest state court passes on it. . . . We think this sufficient here to satisfy the statutory requirement that the federal right sought to be vindicated in this Court be one claimed below. 28 U.S.C. §1257(3).[21]

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[16] See Trial Court opinion, Pet. App., pp. 45-46.

[17] See Trial Court opinion, Pet. App., p. 46.

[18] See Wis. Supreme Court's decision, Pet. App. p. 14.

[19] See Wis. Supreme Court's decision, Pet. App., pp. 18-23.

[20] See Wis. Supreme Court's decision, Pet. App., pp. 22-23.

[21] See also *Ward* v. *Village of Monroeville*, 409 U.S. 57, 61 (1972), *Ocala Star-Banner Co.* v. *Damron*, 401 U.S. 295, 299 (1971), and *Whyy* v. *Grassboro*, 393 U.S. 117, 119 (1968).

Petitioners also dispute the individual respondents' claims as to the merits on this issue,[22] and assert that it is clearly necessary, and well within this Court's jurisdiction, for this Court to review the decision of the Wisconsin Supreme Court.

CONCLUSION

Rule 19-1(a) of this Court governing the considerations for granting certiorari is clearly satisfied in the instant case. The Wisconsin Supreme Court has decided several federal questions of substance not heretofore determined by this Court and, in addition, has decided them in a way not in accord with applicable decisions of this Court. The protection of Indian lands has consistently been of concern to Congress and this Court, and restrictions such as those adopted by the Tribe in Article XII have been vigorously enforced.[23] The alienation of the beneficial interests in the tribal assets, without adherence to the protective provisions of 25 U.S.C. §893, has resulted in the sale of precious tribal lands without the approval of tribal members. Petitioners once again[24] request this Court to uphold their rights under the Termination Act and Plan and the federal constitution.

Respectfully submitted,

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[22] See petition, pp. 22-24, for petitioners' arguments on this issue.

[23] See Brief of National Congress of American Indians, National Tribal Chairmen's Assn., Univ. of New Mexico American Indian Law Center, as Amici Curiae in Support of the Petition.

[24] See *Menominee Tribe of Indians* v. *U.S.*, 391 U.S. 404 (1968).